No. 14373

United States Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,

v.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, a Corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

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INDEX

TABLE OF CASES

COURT RULES

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Appeal from the United States District Court for the Western District of Washington, Southern Division

REPLY BRIEF OF APPELLANT

On page 6 of the Brief of Appellee it cites Rule 52(a) of the Federal Rules of Civil Procedure and then concludes from the rule that the District Court's findings must be affirmed unless this court can make an affirmative finding of its own that the District Court's findings "are not supported by any substantial evidence and are clearly erroneous."

An examination of the Specifications of Error (p. 9, *et seq.* of Appellant's Brief) will disclose that each specification asks the court to consider a conclusion of the District Court. The following is a summary.

I. Is the proposed track a spur or industrial track, on the one hand, or is it an extension of the appellant's line of railroad within the meaning of the statutes?

II. and III. Is Section 13 sought to be reached by the

proposed track tributary to the appellant's Connell Northern branch line and territory served thereby or does the proposed track extend into new territory not tributary to such line or invade territory already adequately served by appellee?

IV. Is the cost of the proposed track a substantial sum of money and will its construction deprive the appellee of substantial revenue?

V. Is the construction of the proposed track in the same territory or substantially the same as the track proposed to be built by the appellant in 1948 by reason of its application to the Interstate Commerce Commission?

In the case of *Plomb Tool Co. v. Sanger* (9th Circuit, 1952) 193 F.(2d) 260, the court said:

> "Nor is Rule 52(a), Federal Rules Civil Procedure, 28 U.S.C.A., applicable to appellant's contention that Sanger was an independent contractor, for it is not the findings of the district court that appellant assails, but rather its *conclusion* drawn therefrom. We have long recognized the advantages enjoyed by the trial judge in evaluating testimony and arriving at the facts flowing from that court's opportunity to observe the witnesses, but here the facts are not in dispute. It is rather the conclusion of the district court with which we have parted company."

Again in the case of *Brown v. Cowden Livestock Co.* (9th Circuit, 1951) 187 F.(2d) 1015, the court said:

> "The findings of the District Judge in this regard are in effect findings as to the effect of these transactions rather than findings which resolve disputed facts. Hence we do not find ourselves obstructed by the traditional rule not to disturb findings of fact of the trial court. We are therefore free to

make our own determination as to the legal conclusion to be drawn."

There is very little conflicting evidence in this case. A large part of it is documentary and there is little dispute in the oral testimony. The sole issue is the correctness of the trial court's conclusions drawn therefrom.

Discussion of Appellee's Statement of the Case and Review of the Evidence

On the first page of the appellee's brief it makes this statement:

> "At the outset we want to correct a misstatement in the Appellant's brief on which it seems to base its entire argument, to the effect that it seeks to construct the track in question *merely* for the purpose of serving two industries. This statement is untrue. It is contrary to the express findings of the District Court and all the evidence introduced at the trial, including the appellant's own witnesses, and, as will hereinafter be shown, the purpose for the construction of the track is to invade a territory which is new to the appellant and already adequately served by the Appellee." (Emphasis supplied)

Again on page 12 of the appellee's brief the following statement is made:

> "The actual purpose for the track in question is that of a running track to connect with an additional series of six miles of track which, according to Appellant's own witness, it would be necessary to construct in order to develop a substantial industrial area in Section 13."

On page 13 of the appellee's brief it states that a

representative of the Pacific Fruit & Produce Company indicated that in the event the appellant constructed appropriate tracks within Section 13 *it might locate* a warehouse at that point.

On page 14 of the appellee's brief it states:

> "A representative of the Interstate Metals Company also testified in effect that he might locate a distribution plant in Section 13 if properly served by trackage; however, again there were no firm commitments (R. 77). This party also had been negotiating with Appellee for an industrial site (R. 333)."

On page 11 of the appellee's brief this statement is made:

> "Exhibit No. 12, which is a drawing prepared by this same engineer, shows tracks radiating from the blue track, which, according to Appellant's engineer, it would be necessary to construct in order to serve the industrial area intended to be created in Section 13."

It is assumed that these are the statements which appellee is relying on to demonstrate that the appellant has made an untrue statement.

In the first place, the appellant has been misquoted. The statement on page 1 of the appellee's brief quotes the appellant as saying it wants to build the proposed track "*merely* for the purpose of serving two industries." (Emphasis supplied)

On page 4 of the appellant's brief it states:

> "The appellant seeks to build a track, for which it acquired the necessary right of way, from its Connell Northern Branch into Section 13, for the

purpose of serving two industries which desire to locate there (R. 339)."

Again on page 15 of the appellant's brief it states:

"It is a track projected from appellant's branch line for the purpose of reaching and serving two industries which desire to locate on appellant's land in Section 13."

The word "merely" does not appear in either place.

Now let us look at the record:

Mr. Moore, the Western Manager Industrial Properties of the appellant, testified that the reason the track is being built is to serve the Pacific Fruit Company and Interstate Metals (R. 339).

Again Mr. Moore testified as follows, under questioning by counsel for the appellee:

"Q. In order to serve industries of that character within the area outlined in blue, it would of course be necessary to build industry tracks extending from the track shown in blue, is that correct?

A. We'd have—I would expect we'd have a subspur for each industry.

Q. In other words, an industry track for each industry off of the track shown in blue?

A. Yes, sir; yes, sir.

Q. Do you contemplate a team track?

A. No, sir.

Q. No team track?

A. No, sir.

Q. And it would be your purpose then to locate other industries of a type which you have described in that same area?

A. Well, I don't know what we can—the future is hard to forecast. I don't know what—

Q. That would be the purpose of building the track and developing that area?

A. Well, it might be a fruit processing company.

Q. Or any other industries that might locate in that area?

A. Yes, if we could find an industry which would develop trackage, I think we'd be interested.

The Court: Sounds like a reasonable proposition." (R. 75, 76)

Counsel for appellee asked the appellant's engineer, Mr. Derrig, if he had any plans or drawings showing tracks in Section 13 connecting with the proposed track, to which question he answered he had no final plans but did have some preliminary sketches (R. 59). He was asked by counsel to produce them (R. 60), which he did, and which sketch or map became Exhibit 12 (R. 193). Mr. Derrig then testified as to the purpose of Exhibit 12, as follows:

"Q. Mr. Derrig, I refer you to Exhibit 12. What is the purpose of this, showing these tracks through farm unit No. 71 as shown on the exhibit?

A. That is a work sheet showing possibility of putting in some additional tracks when and if necessary as may be required by the industries.

Q. Depending on the site of the industries?

A. That is right. One industry may take the entire space of two or three of those tracks we are speaking of. May take.

Q. I see, and one of them may take less?

A. One may take less.

Q. This is just a work sheet?

A. Just a work sheet." (R. 329)

There is no testimony to the contrary, and it is from this exhibit that appellee draws the conclusion that the appellant will construct an additional six miles of track if it is permitted to build the proposed track.

Mr. Wilfred Arthur Martin, supervisor of the shipping of potatoes and onions of the Pacific Fruit & Produce Company, testified that it is his company's plan to build a warehouse on Section 13 as soon as trackage is available (R. 261). He further testified:

> "A. We had thought that we would build a building this year over there, but we have, as we had chosen our site to go on Section 13, but we have been unable to do anything about it, so the thing has just been laying that way. We figure that if you people [N. P. Ry. Co.] get a spur in there that we will have no trouble in consummating a deal and start our building." (R. 265)

Mr. Watson, Secretary and General Traffic Manager of Pacific Gamble Robinson Company d/b/a Pacific Fruit and Produce Company (R. 275), testified:

> "Q. Were you present in the courtroom when Mr. Martin testified this morning?
>
> A. I was.
>
> Q. Did you hear his testimony with respect to the plans of your company to locate facilities in the Moses Lake area?
>
> A. I did.
>
> Q. Have you had anything to do with that matter, or do you know what the plans of your company are with that respect?
>
> A. I have sat in on several conferences pertaining to this arrangement.

Q. Can you confirm the statements that have been made by Mr. Martin with respect to the plans of your company to locate in the Northern Pacific area which has been designated as Section 13?

A. I do.

Mr. Lutterman: If the Court please, I would object.

The Court: I'd just as soon have it that way. It will save a lot of time. You can cross-examine about it. No use of him repeating down the line." (R. 276)

Mr. Warsinske, sole owner of the Interstate Metals Company (R. 333), testified as follows:

"Q. Are you prepared to proceed with the construction facility [a warehouse on Section 13] as soon as the property is available for you and as soon as spur trackage is available?

A. That is right." (R. 337)

We now submit to the court that it is a fair statement, based on the record, that this proposed track is for the purpose of reaching and serving two industries which desire to locate on appellant's land in Section 13. While the Northern Pacific is not legally bound to construct the proposed track, and the Pacific Fruit & Produce Company and Mr. Warsinske of the Interstate Metals Company are not legally bound to construct warehouses on Section 13, nevertheless it must be apparent to everybody concerned that all parties are proceeding in good faith.

On page 14 of the appellee's brief, in referring to the Sugar Company plant it makes this statement:

"Actually, the site of this industry consists of two full sections of land, and is located several

> miles from the City of Moses Lake between the branch lines of the Appellee and Appellant."

This statement, of course, is true. In order to reach the plant it was necessary for the appellant to build a spur track 1.1 miles in length; in order for the appellee to reach it, it was necessary for it to build a spur 3.4 miles in length (Exhibit A3). The sugar plant lies on the plateau which radiates westerly from the station of Wheeler above the town of Moses Lake (Exhibit A3).

Everything said above about the sugar plant is applicable to Section 13 except the track mileage. Section 13 lies between the two branch lines of railroad; it is on the same plateau; and it would be necessary for either or both railroads to build a track to reach it. The track mileage would be reversed a little, but not much, when the grade up the hill from Moses Lake to Section 13 is considered.

On page 15 of the appellee's brief it states in substance that Mr. Sedgwick, the appellee's Western Industrial Commissioner, testified that there are substantial industrial sites available which are already or could readily be served by the appellee, that the appellee has acquired and is acquiring industrial areas for the purpose of keeping ahead of the demand, and that normally new industries would locate on these presently available industrial areas. He further stated that there is more than sufficient industrial property available to take care of all foreseeable industrial expansion.

Mr. Sedgwick is an experienced railroad man, and it is a fair assumption that he knows what he is talking about. If his conclusions are correct that industries

would normally locate on land purchased by the Milwaukee Railroad in and around the town of Moses Lake, why would the Interstate Metals Company and Pacific Fruit & Produce Company go up on the bluff, away from the town of Moses Lake, to locate their warehouses? The record is full of testimony, principally given by Milwaukee employees, that they tried to get both the last above mentioned industries to locate on Milwaukee tracks at or near Moses Lake, but it must now be clear that these two particular industries do not want to be down there. However, again assuming that the conclusions of Mr. Sedgwick are correct and that industries will normally locate on the land acquired by the Milwaukee Railroad, that is going to give the appellee ample opportunity for new business, and the next industry that comes along will probably want to locate where he says it will.

On page 14 of the appellee's brief there appears a statement to the effect that the Pacific Fruit & Produce Company had shipped numerous cars of produce over the appellee's Moses Lake line, and appellee will be deprived of that revenue by the construction of the proposed track and the proposed warehouse. That company in the past had loaded produce at sidings on both railroads (R. 274). This is not a valid argument. Pacific Fruit & Produce Company can't be expected to go on indefinitely on a temporary basis in order that the Milwaukee Railroad will not be deprived of revenue. Pacific Fruit & Produce Company can take its business any place it pleases. Because it has favored the Milwaukee Railroad in the past is no reason it has to continue to do so.

REPLY TO APPELLEE'S ARGUMENT

In our opening brief (page 16) we pointed out that from the decisions it is essential that to constitute the track here in question an extension it must clearly appear that such track extends into *new* territory which is *not tributary* to appellant's line or that it *invades* territory already *adequately served* by the appellee. That is the test stated in the *Texas & Pacific* case (*Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.,* 270 U.S. 266), upon which case the appellee places virtually sole reliance. And in fact the appellee recognizes the stated principle as the test but with respect to appellant's reliance thereon says at page 22 of its brief:

> "The difficulty with the appellant's argument is that the trial court specifically found that the appellant's proposed track would extend to a new territory which the appellant does not now serve, and would invade a territory which is already being adequately served by the appellee."

The trial court, however, made no such findings nor could it properly do so under the evidence. The only finding with respect to the area in Section 13 sought to be reached by the proposed track is in paragraph V of the Findings of Fact, which is set forth on page 3 of appellee's brief, as follows:

> "That the territory sought to be reached by the said proposed track or line of railroad is adjacent and tributary to the trading center of the City of Moses Lake, which City is already being served by the plaintiff's aforesaid railroad and that it is feasible and practicable for said area to be served and occupied by the plaintiff railroad."

That finding, however, if correct, is not tantamount to a finding that the area in Section 13 is "new territory" as to the appellant which is "not tributary" to its line or that the proposed line to such area constitutes invasion of territory "already adequately served" by the appellee. The area in Section 13 which appellant seeks to reach with the proposed track is territory which it has potentially served from the time its branch line was first placed in operation. It is a part of plateau area lying between Wheeler on appellant's Connell Northern Branch and the City of Moses Lake. The plateau area extends west from Wheeler a distance of approximately 3½ miles, at which point, in the westerly half of Section 13, the area breaks sharply down to the west to the City of Moses Lake, where the elevation is from approximately 100 to 145 feet lower than the plateau. The area in Section 13 is comparable in all respects to that part of the plateau area where the U. & I. Sugar Company plant is located, which is served by a spur track from appellant's branch approximately one mile in length and by a spur from appellee's branch approximately 3½ miles in length. It is crystal clear that by any test the area in Section 13 is tributary to appellant's line and is not new territory with respect to that line.

In an attempt to bring itself within the second factor of the test, that relating to invasion of territory already adequately served, the appellee resorts to a wholly misleading argument. It asserts that there is no substantial difference between the appellant's proposed line to Section 13 and its proposed line into Moses Lake under its 1948 application to the Interstate Commerce

Commission. On page 33 of appellee's brief, in connection with that assertion, it invites the Court's attention to Exhibit No. 4, a flat map which does not show the topography of the country. We submit, however, that this map does not show the true picture and we respectfully invite the Court's attention to the topography map, Exhibit A3, which does clearly show the true situation. The presently proposed track and the proposed 1948 extension are both shown on this map. From the contour lines thereon it can readily be seen that the 1948 extension was designed solely to reach into the City of Moses Lake, coming down the hill on an easy grade. The presently proposed track is designed only to come to the top of the bluff at the west edge of the plateau area, some 100 to 150 feet above the City of Moses Lake, and from three-fourths to one mile east thereof. The two tracks were located and engineered for entirely different purposes and the type of service over the respective lines would be entirely different.

Appellant's 1948 application to the Commission, and its proposed trackage in connection therewith, admittedly sought the right to reach an area already being served by the appellee. That clearly is not the case with respect to the proposed track to the area in Section 13. Appellee has no trackage or service to that area. And none could be provided by it by any reasonably practical means except by construction of trackage with a severe grade approximating in length that of appellant's proposed track. Although it is clear that appellant's lands in Section 13 are in its territory adjacent and tributary to its line, the burden of appellee's argument is that if

the industries are to locate in Section 13 the appellee should have the exclusive right to serve them.

On page 20 of its brief appellee summarizes from the *Texas & Pacific* case (270 U.S. 266) to this effect:

> "The Act recognized that preservation of the earning capacity and conservation of the financial resources of individual carriers is a matter of national concern, that the *building of unnecessary lines involves a waste of resources,* * * *." (Emphasis supplied)

But the appellee is not here contending that the proposed track is an unnecessary one. It is, however, urging that it should have the exclusive right to build tracks to serve the industries which clearly desire to locate in Section 13.

CONCLUSION

It is submitted that this case can be reduced to one proposition, which is: Does the Milwaukee Railroad have the exclusive right to serve Section 13?

If the proposed track had been built easterly from the appellant's Connell Northern Branch, probably no one would question it. The Milwaukee Railroad is the only party interested in the presently proposed track; no public body has concerned itself.

If the Milwaukee has the exclusive right to serve Section 13, what about Section 18, which is the one immediately east of Section 13? Or Section 17, which is just east of Section 18, and almost corners into the appellant's Connell Northern Branch? Where is the line to be drawn between the two railroads? If the solution

is to draw a line between them, then it would seem that the most logical thing to do would be to consider the topography of the country and draw the line at the top of the bluff.

The appellee contends that the sugar plant situation is all right because it lies between the two railroads, so both should be allowed to serve it (p. 14 *et seq.,* appellee's brief), even though the Northern Pacific spur is 1.1 miles in length, and the Milwaukee spur is 3.4 miles in length.

It is possible that the appellee is right and both railroads should be allowed to serve the territory between them. That was the solution reached in the case of *Missouri, K. & T. R. Co. of Texas v. Texas & N. O. R. Co.* (5th Circuit, 1949) 172 F.(2d) 768. See page 26 of appellant's brief for an analysis of the case.

For the reasons set forth in the appellant's brief, and partially reiterated here, the appellant respectfully submits that the judgment of the trial court in this cause should be reversed.

Respectfully submitted,

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